

Oneida Tribal Judicial System

Onayote ? a-ka Tsi? Shakotiya? Tolé hte

Appellate Court

Paul Spaulding,
Appellant

Docket No. 13-AC-012

vs.

Date: April 2, 2014

Oneida Bingo & Casino, Cage/Vault.
Susan Danforth
Respondent

Final Decision

This case has come before the Oneida Tribal Judicial System, Appellate Court. Winnifred L. Thomas, Lois Powless, Jennifer Webster, Stanley R. Webster and James Van Stippen (Pro-Tem) presiding.

I. Background

This case is an appeal of the Oneida Personnel Commission's decision dated August 29, 2013 upholding the Written Warning and Suspension.

This case arose as an employment related matter involving Mr. Paul Spaulding, a Cage/Vault Supervisor in the Accounting Department at Oneida Bingo & Casino. Mr. Spaulding received a written warning, and a suspension for negligence in the performance of assigned duties; Oneida Personnel Policies and Procedures V.D.2.I.g. Mr. Spaulding appealed both disciplines by his supervisor to the Area Manager. He then appealed the decision of the Area Manager to the Oneida Personnel Commission and finally, appealed that decision to the Oneida Tribal Judicial System Appellate Court.

Mr. Spaulding asserts the Oneida Personnel Commission's decision is Arbitrary and Capricious

arguing procedural irregularities in the disciplinary process required in the Oneida Personnel Policies and Procedures. This court overturns the Oneida Personnel Commission's decision dated 8/29/2013.

A. Jurisdiction

This case was accepted in accordance with the Oneida Administrative Act, 1.1-1.

Authority. The Oneida Tribe of Indians of Wisconsin has the authority and jurisdiction to enforce this act as well as the responsibility as a government to protect the health, safety, welfare, and economy of the Oneida Reservation lands and all persons who either reside on the reservation or who are visitors and/or are conducting business within the exterior boundaries of the reservation. The Oneida Tribe shall ensure due process of law for the designated citizens through adoption of this act, pursuant to Article VI of the Oneida Tribal Constitution, as amended.

B. Factual Background

Mr. Spaulding, on February 3, 2013 was working second shift window 6 at the Oneida Mason Street Casino Cage reported at the end of his shift that he had a \$100.00 overage.

On February 4, 2013, Mr. Spaulding called his immediate Supervisor Ms. Danforth in the morning to inform her of the priority audit overage on February 3, 2013.

On February 7, 2013, the Accounting Department issued a Priority Audit Report.

On February 8, 2013, the Cage/Vault Department received the Priority Audit Report as evidenced by supported documentation at trial.

On February 14, 2013, the same report has a date stamp indicating the date Ms. Danforth received the report.

March 8, 2013 Mr. Spaulding received an appointment notice to meet with Ms. Danforth to discuss the priority audit report at 1:30 pm on March 11, 2013.

On March 11, 2013, Mr. Spaulding arrived at the specified date and time, however, Ms. Danforth was not there. Mr. Spaulding located Ms. Danforth in the Break Room and was asked by Ms. Danforth to meet later.

On March 15, 2013, Mr. Spaulding reported to work and went to Ms. Danforth's office where he was informed Ms. Danforth was on the gaming floor. Mr. Spaulding located Ms. Danforth in the Cage/Vault Supervisor's office and requested another meeting for the priority audit report issue. Ms. Danforth informed Mr. Spaulding she was involved with another issue and could not meet on this day.

On March 18, 2013 Mr. Spaulding located Ms. Danforth in the early afternoon at 2:00 pm at a Cashier's window. Mr. Spaulding inquired if they could meet on this day. Ms. Danforth replied that she had another meeting to attend. At 3:20 pm Mr. Spaulding walked past the cage and Ms. Danforth was still there, as evidenced by documentation from the hearing.

On March 20, 2013, Mr. Spaulding could not locate Ms. Danforth; however had several email exchanges with her.

On March 22, 2013, Mr. Spaulding received an appointment notice titled, "Follow-up to P.A. Meeting" for 3:30 pm that day. Mr. Spaulding met with Ms. Danforth on this date and time where she asked him three (3) questions in about 10 minutes and the meeting was over.

On March 22, 2013, Mr. Spaulding created a shortage of \$160.98, when he had a cashier overpay a guest.

On March 23, 2013, Mr. Spaulding notified Ms. Danforth via an email of the error providing a

specific time of incident, 6:19 pm.

On March 25, 2013, Mr. Spaulding ran into Ms. Danforth and asked her if wanted to meet with him. And she replied "not today."

On March 26, 2013 Mr. Spaulding received an appointment notice titled, "Finalize investigation." It stated that he was to meet Ms. Danforth in her office on Monday, April 1, 2013 at 1:30 pm.

On March 28, 2013, the Cage/Vault received a priority audit report from the accounting department as indicated with a date stamp on the form. Ms. Danforth received and date stamped form on April 1, 2013.

On April 1, 2013, Mr. Spaulding was issued a disciplinary action (written warning) for the Priority Audit that happened on February 3, 2013.

On April 2, 2013, Ms. Danforth met with Mr. Spaulding to discuss the incident of March 22, 2013.

On April 12, 2013, Ms. Danforth indicates on the disciplinary form page 2 she concluded her investigation.

On April 15, 2013, Mr. Spaulding filed appeal of Written Warning to Area Manager.

On April 16, 2013, Ms. Danforth issued a suspension (3 days) to Mr. Spaulding.

On April 19, Area Manager upheld the Written Warning.

On April 21, 2013, which is a Sunday, Mr. Spaulding returned to work as instructed on the

disciplinary action form. At that time he learned he had no access to any computers, secured doors, or keys. All attempts to contact Ms. Danforth text and phone, on her casino provided cell phone to request to leave for the day went unanswered.

On April 22, 2013, called in due to the stress and embarrassment having to work a day without the access he needed to do his job.

On April 23, 2013 Mr. Spaulding returned to work and requested a meeting with Ms. Danforth to discuss what happened on April 21, 2013. It was at this meeting Ms. Danforth informed Mr. Spaulding that it was standard procedures to remove all access to sensitive areas when the person is on suspension.

On April 23, 2013 Mr. Spaulding, via his representative, filed an appeal of the three day suspension to the Area Manager.

On April 25, 2013, the Area Manager responded to the appeal upholding the suspension.

On May 3, 2013, Mr. Spaulding filed a request for hearing at the Oneida Personnel Commission without representation on the Written Warning.

On May 3, 2013, Mr. Spaulding's advocate filed a request for hearing at the Oneida Personnel Commission on the suspension.

On August 29, 2013 the Oneida Personnel Commission upheld the decision of the Supervisor on the Written Warning and Suspension.

C. Procedural Background

The Oneida Personnel Policies and Procedures Manual is the controlling document in

disciplinary matters. Section V.D.5.b. Disciplinary Procedures of the Oneida Personnel Policies and Procedures: *If disciplinary action is warranted, within five (5) working days the supervisor will fill out the five (5) part disciplinary action form stating the behavior for which the action is being taken, the time and date of its occurrence, and the specific policy section under which action is being taken.*

Failure to provide the facts on the Disciplinary Action Form would be harmful to the employee. The Disciplinary Action Form is a guide to assist supervisors when issuing a discipline.

On the Disciplinary Action Form part II- Unsatisfactory Work Performance and/or Policy Violation, and where the violation is identified just under that section is **(Required) Time, Date and Description of Incident(s): Attach additional information if necessary.** This states Required.

The Oneida Personnel Commission has a duty to uphold the laws of the Oneida Tribe. The law as it appears in the Oneida Personnel Policies and Procedures is to be upheld. The Oneida Personnel Commission allowed the law to be circumvented. In their decision the Oneida Personnel Commission ruled, "Through testimony offered by the Respondent, and documentation also submitted by the Respondent, included an email from HRD, specifically the EEO office, dated May 22, 2013, that it was proper to use a shift in lieu of the exact time for the Written Warning and Suspension."

When these processes are not followed it can lead to "Procedural Irregularities" in the disciplinary process.

Exceeding the five days for the investigation has previously been addressed in our cases. See *Rentmeester v. Madrid*, 10-AC-007 (11/23/2010); *Oneida Bingo and Casino v. Heier*, 07-AC-011 (11/26/2007), *Oneida Bingo and Casino v. Betters*, 02-AC-005 (7/30/2002). The issue in most of these cases has been from what point does the five days begin? The court has allowed

the supervisor the discretion as to how long the investigation will take and when it ends. However, in *Oneida Bingo and Casino v. Heier*, 07-AC-011 (11/26/2007) “Here, the investigation was not too long and the discipline was issued within five days of the end of the investigation. This case is one of the reasons we have previously said that the length of the investigation can be longer than five days. When audits must be conducted to review the thousands of transactions that occur every day at the casino, it is understandable that an investigation may take longer than five days. As long as the investigation is not abusively or unreasonably long, supervisors should have some discretion to make sure all of the facts are gathered. This aids in making sure the supervisor will make a good decision.”

This court finds the length of time that it took to conclude the investigation was extremely lengthy, thirty-six (36) days was too long.

II. Issues

Is the decision of the Oneida Personnel Commission arbitrary and capricious?

Were there procedural irregularities in the disciplinary process?

III. Analysis

Is the decision of the Oneida Personnel Commission arbitrary and capricious?

Yes, the Oneida Personnel Commission decision is arbitrary and capricious.

For a decision to be arbitrary according to Black’s Law Dictionary, the decision is founded on prejudice or preference rather than on reason or fact. For the decision to be capricious it has to be contrary to the evidence or established rule of law.

In this case the Oneida Personnel Commission’s decision is contrary to the evidence using the measurement of the time of the infraction as shift rather than actual time.

The Oneida Personnel Commission reasoned the use of the word “shift” in lieu of the exact time for the Written Warning and Suspension was permissible to use when the law states: *V.D.5.b. If disciplinary action is warranted, within five (5) working days the supervisor will fill out the five (5) parts disciplinary action form stating the behavior for which the action is being taken, the Time and date of its occurrence, and the specific policy section under which action is being taken.*

The Oneida Personnel Commission found because there was no time listed on the disciplinary action form that it is not compelling enough to overturn the Written Warning.

In the evidence provided in Exhibit A-1 there is a memo of the Caused Priority Audit that showed the start and end time on March 22, 2013, at 18:19:38 ending 18:20:31 for the \$161.01 overage payment to a customer, when in fact the customer was only due \$.03. Ms. Danforth had received the Priority Audit Report from the Accounting Department via email providing the date and specific time.

The Oneida Personnel Commission found that Mr. Spaulding did not dispute the disciplinary actions. He admitted the overage and the shortage; even though he did however question the time it took to meet with him. Mr. Spaulding did question the delay in imposing the discipline. The Oneida Personnel Commission stated in their decision Mr. Spaulding’s “argument was not compelling in and of itself to overturn the disciplinary actions.”

The fact that there had been no active action in this investigation from the time of the infraction to conclusion of the investigation for 36 days is unacceptable.

On March 22, 2013, Mr. Spaulding, met with the supervisor at 3:30 pm and she asked him three (3) questions about the incident concerning the Priory Audit of February 3, 2013, within ten minutes the meeting was completed. On this same day Mr. Spaulding created another Priority

Audit this time it was a shortage of \$160.98, when he had a cashier overpay a guest.

On March 23, 2013, Mr. Spaulding notified Ms. Danforth via an email of the error providing a specific time of the incident, 6:19 pm.

On April 16, 2013, Ms. Danforth issued a suspension (3) days to Mr. Spaulding.

The first violation occurred on February 3, 2013 of an overage of \$100.00; the second violation occurred on March 22, 2013 was a shortage of \$160.98.

Mr. Spaulding's first violation on February 3, 2013 was disciplined on April 1, 2013 with a Written Warning.

Mr. Spaulding's second violation was created on March 22, 2013, and was disciplined with the conclusion of her investigation on April 12, 2013 and issuing Mr. Spaulding a Suspension of 3 days.

While the court has case law to reference, this case takes its own turn having different circumstances unlike the following cases.

07-AC-014 Laura Hill vs. Patricia Denny the Appellate Court decision stated "Even though the Denny, W. and Elm decisions let the employer argue for Blue Book violations beyond those included in the original disciplinary notice, it is the rule of this court that the disciplinary notice provided by the employer shall include the specific date and time of the alleged infraction in writing. A statement of when the supervisor became aware of the alleged incident is, by itself, insufficient."

07-AC-011 Oneida Bingo & Casino, Table Games Department, vs. Richard Heier November 26, 2007. This case arises out of an eight-day suspension. The Appellate Court stated "Our ruling

today should not be read as a blank check for supervisors to delay action on grievances for an unreasonable long period of time under the pretext of completing the investigation.” The decision goes on to state “We encourage supervisors to notify the Human Resources Department the date investigations are completed. Timely disciplinary action can then follow as warranted.”

10-AC-007 Department of Public Works, Kevin Rentmeester vs. Patrick Madrid November 23, 2010; this case involved the termination of Mr. Madrid. In the decision the Court found that “On September 22, 2009, Lisa Hock with the Human Resources Department informed Mr. Rentmeester that Mr. Madrid’s driver’s license was suspended and stated he could not drive a personal or tribal vehicle. It was at this point Mr. Rentmeester began his investigation of Mr. Madrid’s possible violation of the Vehicle Drivers Certification Policy.” “On January 8, 2010 Mr. Rentmeester met with Mr. Madrid and explained why he was being terminated from employment.” The Court found “We determine the untimely issuance of the discipline to be a harmless error, which in the end had an unfavorable benefit to Mr. Madrid by allowing him the status of employee for an extended time period.”

12-AC-018 Carol Penass vs. Connie Hill Mickey Petitjean, Oneida Bingo & Casino Cage Vault Department; this case involves a Suspension. In the courts decision it is stated “Here, the investigation was not too long and the discipline was issued within five days of the end of the investigation. This case is one of the reasons we have previously said that the length of the investigation can be longer than five days. When audits must be conducted to review the thousands of transactions that occur every day at the casino, it is understandable that an investigation may take longer than five days. As long as the investigation is not abusively or unreasonably long, supervisors should have some discretion to make sure all of the facts are gathered. This aids in making sure the supervisor will make a good decision.”

Case Law has proven one fact; that there are no timelines laid out in the Oneida Personnel Policies and Procedures stating how long it should take to do an investigation. *Oneida Personnel Policies and Procedures V.D.5.a.1).b Disciplinary Procedure; Supervisor becomes aware of*

unsatisfactory work performance or violation; 1) Supervisor investigates through a meeting with the employee and determines whether disciplinary action is warranted. b. If disciplinary action is warranted, within five (5) working days the supervisor will fill out the five (5) part disciplinary action form stating the behavior for which the action is being taken, the time and date of its occurrence, and the specific policy section under which action is being taken.

In the Oneida Personnel Commission decision they had expressed concerns on the issue of timeframes regarding the length of time that it took to do the investigation by the supervisor, and their decision reflected the fact that it took the supervisor 36 days to conclude the investigation. The supervisor issued Mr. Spaulding a discipline on April 1, 2013; due to the fact Mr. Spaulding created a Priority Audit/variance February 3, 2013, for \$100.00 overage. As a result of that Audit, Lee Ann Schuyler, Compliance Officer, sent a memo to Carie Stedman Accounting Manager, stating "After reviewing the cashier's paperwork, there were no errors noted. There were also no offsetting variances found for this day. At this time, the reason for the overage is not known." For this Mr. Spaulding received a Written Warning.

On this written warning it took thirty-six (36) days to meet with the employee from the date the supervisor had been informed of the violation on February 4, 2013.

The evidence has been laid out to follow the time frames that the supervisor and employee could have had a meeting, but that did not happen. The missed opportunity to meet with each other has created concern for this court.

While the Oneida Personnel Policies and Procedures are silent on the time frame that should be taken for investigations it is loud and clear on when a supervisor is to meet with the employee. According to the Oneida Personnel Policies and Procedures V.D.5. *Disciplinary Procedures; the following procedure shall be adhered to whenever disciplinary action is taken: a. Supervisor becomes aware of unsatisfactory work performance or violation. b. If disciplinary action is warranted, within (5) working days the supervisor will fill out the five (5) part disciplinary*

action form stating the behavior for which the action is being taken, the time and date of its occurrence, and the specific policy section under which action is being taken. This did not happen. There had been acknowledgment that the Priority Audit Report had been received by the supervisor on February 14, 2013 however did not arrange for a meeting to discuss with the employee until March 8, 2013.

Were there procedural irregularities in the disciplinary process?

Yes, there were procedural irregularities in the disciplinary process.

A violation occurred on February 3, 2013, and the supervisor is notified on February 4, 2013 but does not impose discipline, a Written Warning, until April 1, 2013 this is far too lengthy.

The employee, Mr. Spaulding, appealed the discipline to the Area Manager on April 15, 2013 and received his answer on April 19, 2013 upholding the supervisor's action.

While awaiting the investigation to conclude from the February 3, 2013 violation, Mr. Spaulding created another violation similar to the first only this time it was a shortage violation on March 22, 2013. Supervisor concluded this investigation on April 12, 2013 and issued the discipline of a (3) three day suspension on April 16, 2013.

Now here is where this case takes its own turn.

Mr. Spaulding appealed to the Area Manager on April 23, 2013 and the Area Manager rendered his decision on April 25, 2013.

On April 1, 2013 and again on April 25, 2013 Mr. Spaulding's Area Manager upheld the supervisor's decision.

Oneida Personnel Policies and Procedures *V.D.2.a. Disciplinary Actions: Disciplinary actions will be initiated by an immediate supervisor for the purpose of correcting unacceptable work performance. The supervisor will always discuss the action with the employee being disciplined to ensure that the employee:*

- 1) Understands the reason for the disciplinary action;*
- 2) Understands the expected work performance in light of the disciplinary action;*
- 3) Understands the consequences of continued unacceptable behavior.*

In this case the time to correct the behavior was (15) fifteen days from the first discipline to the last.

If the disciplinary action is not timely, it does not serve the purpose for which the rule was written. Instead the delay can cause the opposite reaction by the added stress and the worry of the employee concerning their status.

This court cannot take either side however it is ironic that on the same day Mr. Spaulding was disciplined for the first violation after (36) thirty six days that he should experience yet another violation very similar to the first. He argued in court that the stress level contributed to another discipline.

This Appellate Court concurs with the Oneida Personnel Commission's recommendation that the Gaming Division should review and develop policies that address this very issue of length of an investigation. We find that 36 days are too excessive and overturn the Oneida Personnel Commission's decision to uphold the disciplines that had been issued.

IV. Decision

It is the decision of this Appellate Court to OVERTURN the decision of the Oneida Personnel Commission.

This Court orders the Gaming Commission to address the length of time that it shall take a Supervisor to conclude an investigation with a status report to the Appellate Court no longer than (90) ninety days from this date.

IT IS SO ORDERED